

BOOK

The Justice of Economics: An Analysis of Wealth Maximization as a Normative Goal

THE ECONOMICS OF JUSTICE. By Richard A. Posner. Cambridge, Mass.: Harvard University Press. 1981. Pp. xiii, 415. \$25.00.

*Reviewed by Richard Schmalbeck**

The concept of justice—especially as it relates to wealth distribution—has been extensively reconsidered by a number of scholars in the last dozen years or so. The most significant recent works on the subject are by political philosophers:¹ John Rawls's *A Theory of Justice*,² and Robert Nozick's *Anarchy, State and Utopia*.³ Although some economics is almost unavoidable in discussions of wealth distribution, these books have used economic analysis incidentally; their economic elements were tools of analysis, not the centerpieces of their ethical frameworks.

For Richard Posner,⁴ economics is much more than a tool. In his recent book, *The Economics of Justice*, Posner argues that economics, in the form of his wealth-maximization theory, provides the soundest ethical basis for the organization and operation of social institutions.⁵ Although this Review comments on that book, it also considers earlier articles by Posner on the same subject, and, to a lesser degree, the theories of certain of Posner's critics. Finally, this Review also provides an opportunity to express some more general reservations about the usefulness of economic analysis in legal studies, especially in areas that touch on ultimate jurisprudential issues.

* Associate Professor of Law, Duke University Law School. A.B. 1970, J.D. 1975, University of Chicago.

I am grateful to several of my colleagues, particularly Walter Dellinger, Chris Schroeder, and Charles Clotfelter, for their helpful comments on the first draft of this Review.

1. A great many recent works have been devoted in full or in part to distributive justice questions. Ronald Dworkin's *Taking Rights Seriously* (1977), considers many of the issues discussed in this Review, as does Norman E. Bowie's *Towards a New Theory of Distributive Justice* (1971). The recent yearbooks of the American Society for Political and Legal Philosophy have examined many of these issues. See especially *Ethics, Economics, and the Law*, Nomos XXIV, (J. R. Pennock & J. W. Chapman eds. 1982). See also sources cited *infra* note 5.

2. J. Rawls, *A Theory of Justice* (1971).

3. R. Nozick, *Anarchy, State and Utopia* (1974).

4. Judge, United States Court of Appeals for the Seventh Circuit; formerly Lee and Brena Freeman Professor of Law at the University of Chicago Law School.

5. The wealth-maximization concept is explained *infra* Section I. I am aware of two recent books that adopt viewpoints in many respects similar to Posner's, though they focus on the moral implications of wealth maximization. Peter T. Bauer's *Equality, the Third World, and Economic Delusion* (1981), examines distributive justice in a cross-cultural context. George Gilder's *Wealth and Poverty* (1981) is a popular treatment of some of the same ideas.

Posner's first exploration of the ethical aspects of law and economics appeared in a pair of articles published in 1979 and 1980.⁶ To say that those articles were controversial is to put it charitably. In fact, nearly everyone who responded to them found much to criticize, often with much venom.⁷ Publication of the articles in a booklength treatment has produced a similar response.⁸

The virulence of the reaction is intriguing. It would seem that Posner is an attractive target, and reasons for this can readily be imagined. Posner has an apparently willful coldness in assessing, among other things, the sometimes forbidding consequences of his own theories.⁹ Whether this feature of his work reflects insensitivity or merely a refusal to engage in sentimentality, it surely serves to stimulate harsh replies. A more positive aspect of his work—but one that also makes him an inviting target—is that his writing has a quality that many book jackets promise, but somewhat fewer serious works actually deliver: lucidity.¹⁰ His is a remarkably clean style, well-matched to the ideas he presents. Some admire this quality of Posner's work; others appear to think that his simple presentation reflects an excessively simplified view of the world.¹¹ In any case, Posner's ideas are generally not insulated from scrutiny by obscurity of presentation.

6. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. Legal Stud. 103 (1979); Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 Hofstra L. Rev. 487 (1980) [hereinafter cited as Posner, *Efficiency Norm*].

7. See, e.g., Horwitz, *Law and Economics: Science or Politics?*, 8 Hofstra L. Rev. 905 (1980), in which Professor Horwitz concludes that the "fad" of economic analysis has now "peaked out," with Posner's article in the same volume of the Hofstra Law Review, Posner, *Efficiency Norm*, supra note 6, being "a dramatic sign that the scientific pretensions of the economic analysis of law are rapidly crumbling."

8. See, e.g., Englard, *The Failure of Economic Justice* (Book Review), 95 Harv. L. Rev. 1162 (1982).

9. One of the best examples of this, admittedly taken slightly out of context, is the following quotation from Posner, *A Reply to Some Recent Criticisms of the Efficiency Theory of the Common Law*, 9 Hofstra L. Rev. 775, 791 (1981): "I do not think there is a broad social duty to support people who cannot or will not support themselves. Some nonproductive people might therefore starve in a system guided by wealth maximization." Posner does go on to note that people are more likely to starve in poor societies than in wealthy ones, and that societies that reject wealth maximization are more likely to be poor. *Id.* at 791 n.68.

Posner's willingness to write things that conventionally nice people wouldn't write may sometimes encourage carelessness in his critics. That is, they begin to read Posner as saying outrageous things even when he isn't. A good example of this is in Englard's review of *The Economics of Justice*, Englard, supra note 8, at 1177 n.25, in which Englard refers to Posner's description of the poor as "loud . . . , hostile, [and] irresponsible." Englard has ignored Posner's use of the subjunctive. The Posner statement to which Englard refers says, instead, that a substantial portion of *any* particular group may be characteristically loud, hostile, etc., and that if that is the case, there may be some efficiency in avoiding contact with all members of that group, despite the fact that further (possibly costly) association with members of the group might serve to identify *some* members of the group who lacked the particular obnoxious qualities, and with whom association might be valuable. See *infra* text accompanying note 129.

10. The jacket of *The Economics of Justice* makes the same unexceptional promise: it avers that Posner is "an extremely lucid writer." In this case, however, the assertion seems justified.

11. See, e.g., Priest, *The New Scientism in Legal Scholarship: A Comment on Clark and Posner*, 90 Yale L.J. 1284 (1981).

But perhaps the most important factor in making Posner such an interesting target is that his ideas are often very persuasive. Their surface cogency calls forward vociferous rebuttal from those who disagree—at least partly because able statements of wrong-headed positions seem to require nothing less.

The Economics of Justice has all of these qualities in ample measure: it is blunt, it is clear, and it is, at least intermittently, very convincing. It is a book that has several serious flaws, but it is unfailingly interesting and stimulating.

One of the major shortcomings of the book—especially for those who may have hoped for a booklength exposition of the ideas presented first in his 1980 article¹²—is that the book does not add much to the article. Indeed, the book became a book only by adding a great deal of material about topics related only tangentially to the title. The book consists of four parts, plus a preface, an introductory chapter, and an annoyingly erratic index.¹³ The first part is the core of the book, and the only part well-described by the title. This part is called “Justice and Efficiency.” The second part deals with law in primitive society, and is called “The Origins of Justice.” The third part is an analysis of the economics of privacy, and of the Supreme Court’s strangely persistent tendency to decide cases in a way precisely opposite to that dictated by Posner’s economic analysis. The fourth part has the same descriptive and critical elements as the third part, but has as its subject discrimination rather than privacy.¹⁴

In addition to the subject matter diversity, there are important differences in approach among the four sections, having to do generally with whether Posner’s treatment of the various topics is “normative” or “positive.” Positive economics seeks to describe and explain behavior according to economic models. Posner’s principal work in this area has consisted of developing the theory that Anglo-American common law is best explained by assuming that judges are—consciously or intuitively—trying to allocate resources efficiently.¹⁵ Most of Posner’s work to date has been positive, and Posner maintains that this is in fact the more interesting part of law and

12. Posner, *Efficiency Norm*, *supra* note 6.

13. I have not made a comprehensive review of the index. I did notice, however, that three scholars—Richard A. Easterlin, Edward O. Wilson, and David P. Barash—whose work bears on some of the issues Posner discusses, are cited by Posner (Easterlin at p. 64; Wilson at pp. 140, 170, & 186; and Barash at pp. 162, 186, & 187) but are not included in the index. Anthropologist Lucy Mair is included in the index, with references to pp. 165 & 186. Those references are accurate, but citations to Mair of similar significance also appear at pp. 140, 149, 150, 173, 185, & 189. If there is some selection process at work here, it is undisclosed and undiscernable.

14. Merely to list these diverse subjects is to raise the suspicion that this book exists because it was thought that a market for it existed first. That suspicion derives support from the fact that all of the book’s fourteen chapters save the introductory one are based on previously published articles (p. viii). One wishes Posner had been a bit more straightforward about this. Since he is usually candid to a fault, and since he would surely be one of the last people on earth to experience shame over responding normally to market incentives, it is almost embarrassing to see him strain at the effort of trying to connect topics as diffuse as these into a coherent whole.

15. Posner, *supra* note 9, at 775.

economics research.¹⁶ Posner's major work in positive economics is, of course, his book *Economic Analysis of Law*, first published in 1972.¹⁷ The normative aspect of Posner's work takes the positive analysis one step further, arguing that economic analysis explains not only the way the law does work, but also the way the law should work.

Since the word "justice" has almost purely normative connotations, one might have expected that a book called *The Economics of Justice* would be primarily, if not exclusively, normative in approach. Indeed, one might expect that it would be the normative counterpart to *Economic Analysis of Law*. However, only the first part of the book, on efficiency and justice, is purely normative in approach. The second section, on primitive law, is almost purely positive. The third and fourth sections, on privacy and discrimination, combine elements of both positive and normative analysis.

Posner has thus presented in this book something of a melange of subjects and methods. Nevertheless, at least three of the four subjects in the book are to some mild degree conceptually linked. One could say that the first part, on justice and efficiency, sets out the core theory of the book, that the second part, on primitive law, provides a background—more developmental than historical—on the context in which these issues arise, and that the fourth part, on discrimination, applies portions of Posner's normative theory to an area where considerations of justice are generally conceded to be paramount. As has been argued above, and as will be shown in detail below, this short statement of the materials in the book exaggerates the closeness of their relationships to each other, but it provides a useful framework for analysis. The materials in the third part on privacy simply do not fit, and they will not be considered in this Review.

I.

Part I of *The Economics of Justice*, and particularly chapters three and four, present Posner's basic ideas on the subject that gives this book its title. Part I follows a brief introductory chapter and consists of chapters 2-4: chapter 2 compares the theories of William Blackstone and Jeremy Bentham; chapter 3 differentiates Posner's wealth maximization from utilitarianism, which it in many respects resembles; and chapter 4 sets forth the ethical and political basis of wealth maximization. Readers who are very interested in their own personal efficiencies—and this book seems a likely candidate for the reading lists of such people—can garner most of what this book has to say about the relationship between justice and economics by reading only chapters three and four, and investing their scarce time resources elsewhere than in the book's other twelve chapters.

16. Id. at 779.

17. R. Posner, *Economic Analysis of Law* (1st ed. 1972). The current and substantially revised edition of *Economic Analysis of Law* (2d ed.) was published in 1977. Subsequent citations are to the second edition unless otherwise noted.

This part of the book centers on the theme that legal rules and, more broadly, political institutions in general, should be evaluated in terms of whether or not they promote "wealth maximization"—that is, whether the legal rule or institutional arrangement under examination tends to increase the aggregate wealth of society. "Wealth," as Posner uses the term here, is not simply the sum of the market values of all property held. He means to include as well consumer and producer surplus (p. 60). Surplus values arise because, as a general matter, people (and entities) continue to hold particular items of property precisely because they attach a higher value to those items than the market does. These incremental values are a genuine source of augmented utility, and Posner definitely means to account for them in evaluating the effect of legal rules. Posner specifically does not mean to account for all utility, however, but only for utility backed up by willingness to pay. This is the principal distinction between wealth maximization and utilitarianism.

The distinctions among market value, wealth, and utility can be illustrated by imagining that *A* owns a small house in Hollywood having a market value of \$150,000. Because *A* has become highly sensitive to smog, the house is not worth \$150,000 to him, and he decides to sell it. *B* is insensitive to smog, and needs a home in the Hollywood area. He would pay up to \$200,000 for a house like the one *A* owns, though his real estate agent informs him that he can get the sort of house he wants for less.¹⁸ *C* is not only insensitive to smog, but is also much enamored of the possibility of rubbing elbows with movie stars in Hollywood. He would obtain twice the pleasure *B* would receive from owning *A*'s house, but, alas, has neither the cash nor the creditworthiness necessary to pay \$150,000. A plausible outcome of this situation is that *A* will sell his house to *B* for \$150,000.

This transaction does not necessarily maximize the aggregate *market* value of all property held. The market value of the house remains the same, or, if anything, declines slightly.¹⁹ Nor does this transaction maximize utility: by assumption, *C* would derive more utility from this house than *B* will. The transaction does maximize wealth, however; after the transaction, the house is

18. Anecdotal evidence suggests that most people have for the last several years viewed housing as an "overpriced" commodity. Thus, a more common scenario is that the potential buyer is initially "willing" to spend, say, \$100,000 for a particular type of house, and is informed by his real estate agent that such a house will cost at least \$150,000. (Of course, if a transaction takes place at the latter price, it is proof that the buyer was ultimately willing to pay \$150,000.) Because of the widespread view that housing is somehow more expensive than it should be, it is perhaps not the best example of a commodity in which the presence of consumer surplus is intuitively obvious. Housing is, however, the best example of a commodity that might hypothetically produce large amounts of utility for people who are unable to purchase such housing because of limited means. I hope therefore that the reader will indulge me in assuming that the situation described in the text is conceivable, if uncommon.

19. To have been the successful bidder, *B* must have been the highest bidder. If *B*'s circumstances should change in the next moment so that another sale were necessary, the highest bidder would now be the one who previously had been the second-highest bidder. However, since *B*'s bid need only have been infinitesimally higher than that next highest bid, the modest erosion of the market that results when *B* withdraws from it can usually be ignored.

held by one who values ownership of that house at \$200,000, whereas before the transaction the house was held by one who valued it at less than \$150,000 (he would not otherwise have sold at that price). That this is the maximum increase can be inferred from the fact that no one outbid *B* for the house.²⁰

Posner is quite clear in explaining what wealth maximization means. He is considerably less clear about the central question of this part of the book: why a society organized around such principles is ethically or morally superior to all other imaginable societies that are not so organized. The problem, it seems, is that hardly anyone since King Midas has really believed that wealth is an ultimate goal. One may want many things that wealth can provide (and at least some that it cannot), but pursuit of wealth for its own sake, by an individual or by a society, is distinctly pathological. It is deviate in large part because it seems so unreasonable, so completely confused about means and ends. It is rather as though one were to say that one's diet should be arranged to maximize bananas. One may wish to *optimize* qualities such as tastiness, vitamin and mineral content, and fiber content; and it may just possibly be that arranging one's life so as to encourage banana consumption is the best way to achieve that optimal combination of qualities. But to say that banana maximization is a proper principle around which to organize one's diet is at best a misleading shortcut through the analytical process of explaining why we should eat more bananas, and at worst an inaccurate explanation of basic dietary principles.

Posner never really makes it clear in this book whether he thinks that wealth maximization is simply a means to a just society, or is itself the central, defining property of such a society. In fact, if one were not inclined to give Posner the benefit of the doubt on this point, one would have to conclude that his language seems more to support the latter interpretation. He does, after

20. This inference is oversimplified in two ways. First, I have assumed that the availability of the house is widely known or knowable at no cost, so that other potential bidders are in a position to bid if they wish to. This is realistic enough in this context, since multiple-listing services currently used by the real estate industry make information widely available at little marginal cost. (The information costs may actually be significant, but they are buried in the agent's commission, and essentially sunk costs for anyone interested in buying a house.) The second assumption is that this particular house is in some important sense unique. This assumption is not realistic in the context of a \$150,000 house in Los Angeles; it doesn't really need to be realistic, however, because Posner uses the phrase "willingness to pay" in a somewhat hypothetical sense. To illustrate, assume that there is another potential buyer, *D*, in the example in the text, and that *D* would be "willing" to pay \$210,000 for *A*'s house. If *A*'s house is uniquely valuable to both *B* and *D*, *D* will win the auction, since he would be willing to bid more than the \$200,000 that is *B*'s maximum bid. If, however, there are many essentially fungible houses of this type, *B* and *D* would not need to bid against each other. Each would select a \$150,000 house and pay something close to that market price. The point here is simply that people are not, as a general matter, "willing" to pay more than the market price, regardless of how much consumer surplus such a purchase might confer, as long as that same product is available at the market price from another vendor. "Willingness" to pay in this sense therefore doesn't mean an actual willingness under the stated static conditions, but may be best understood as a statement about the shape of the demand curve: *even if* the market price for houses of this sort were to increase, *B* and *D* would continue to be willing buyers, up to market prices of \$200,000 and \$210,000, respectively.

all, write of wealth maximization as a "moral principle" (p. 69), and also of the ability to "derive" the "conventional pieties—keeping promises, telling the truth and the like" (p. 67) from that wealth-maximization principle. And he goes to some lengths to explain why wealth maximization is not the same thing as other goals that might have a more plausible claim to being basic values, such as happiness (p. 65) or personal autonomy (p. 98). It is certainly understandable that some of Posner's critics—notably Ronald Dworkin—have taken him to task for confusing mediate goals with ultimate goals.²¹

Posner's response is that *he* is not confused—though he admits that he may have misled Dworkin and others by insufficiently describing just what the ultimate goals served by wealth maximization are.²² Since the Dworkin criticism was written in part as a comment on Posner's 1979 article in the *Journal of Legal Studies*,²³ Posner has had an opportunity in *The Economics of Justice* to correct any misleading impressions on this point that may have been conveyed in that article. He seems not to have taken full advantage of this opportunity, however: the language quoted above to the effect that wealth maximization is a moral principle comes from *The Economics of Justice*, and is substantially unchanged from the 1979 article.²⁴ But Posner does give the reader a somewhat better sense of his ultimate goals in the book than he did in his earlier articles. Essentially, he argues that a society organized to maximize wealth produces a reconciliation between the sometimes competing goals of utility and liberty (p. 115).²⁵

Posner is reasonably persuasive in explaining how wealth maximization is something of a hybrid between Bentham's unrestrained utilitarianism and what Posner (and others) have referred to as "Kantian" notions of inviolable personal rights (p. 55).²⁶ It would seem that Posner should then argue his case in two steps: (1) that utility and liberty are the only ultimate goals worth pursuing in an ethical society; and (2) that a wealth-maximizing society produces the best combination of these two qualities, and, hence, the best society. After all, once it is conceded, as it must be, that wealth maximization is only a mediate goal, it has no independent appeal as an ethical system.

21. Dworkin, *Is Wealth a Value?*, 9 J. Legal Stud. 191, 194 (1980).

22. Posner, *The Value of Wealth: A Comment on Dworkin and Kronman*, 9 J. Legal Stud. 243, 244 (1980).

23. Remarkably, Posner has three articles in the 1979 Volume (Vol. 8) of the *Journal of Legal Studies*. Posner, *Epstein's Tort Theory: A Critique*, 8 J. Legal Stud. 457 (1979); Posner, *Efficiency Norm*, *supra* note 6; Landes & Posner, *Public and Private Characteristics of a Legal Process: A Comment*, 8 J. Legal Stud. 235 (1979). I refer here to the Posner, *Efficiency Norm*, *supra* note 6.

24. Posner, *Efficiency Norm*, *supra* note 6, at 123, 125.

25. Posner adds: "and even equality" to utility and liberty, but he would not appear to argue that equality is an ultimate goal. It rather appears to be an incidental effect. See, e.g., p. 81, where Posner states that, under a wealth-maximization system, "the specific distribution of *wealth* is a mere byproduct of the distribution of rights A just distribution of wealth need not be posited." (Emphasis in original.)

26. Posner indicates here that he is following Bruce Ackerman's use of the term "Kantian" in *Private Property and the Constitution* (1977) to refer to ethical theories that emphasize the primacy of personal autonomy.

Posner does not, however, formally state the argument this way. Instead he assumes implicitly that the two ultimate goals are the *only* appropriate ones,²⁷ then shows that pursuit of either goal as a primary principle leads to demonstrably poor results in some circumstances, and finally shows that wealth maximization avoids those poor results. In other words, wealth maximization takes the rough edges off of utilitarianism and personal rights theories, and reconciles them where they conflict. Does it produce the “best” reconciliation? Posner seems to think so, though he does not address the question directly. Perhaps he would say simply that if another ethical theorist has a better reconciliation, let him come forward.

Because Posner has put his argument in this somewhat informal way, much of chapters 2–4 consists less of an affirmative statement of the virtues of wealth maximization than a demonstration of why utilitarianism and rights theories, purely pursued, lead to unsatisfactory results. In particular, utilitarianism bears the brunt of this attack. And “attack” seems the proper word: Posner is quite vehement in his demonstrations of the inadequacy of pure utilitarianism. The emphatic tone of his arguments on this point may stem in part from the fact that Posner has been thought to be making utilitarian arguments in his earlier work.²⁸ Posner seems to think that this confusion between wealth maximization, or normative economics, and utilitarianism may be a rhetorical device. He writes:

[A]mong the severest critics of the economic approach to law are those who attack it as a version of utilitarianism. Their procedure is to equate economics with utilitarianism and then attack utilitarianism. (P. 48).²⁹

It should be noted that any “confusion” between Posner’s economic analysis and utilitarianism was in fair measure of Posner’s own making,³⁰ but in any case, Posner appears determined in *The Economics of Justice* to put any such misapprehension—real or feigned—to rest. He makes it quite clear in chapter

27. Posner has written that wealth “is conducive to happiness, freedom, self-expression and other uncontroversial goods.” Posner, *supra* note 12, at 244. By “uncontroversial” I presume he means only that there would be general agreement that the more of these “goods” society has, the better that society is, all other things being equal. However, even though “happiness, freedom, and self-expression” may translate roughly to the utility and liberty concerns discussed in *The Economics of Justice*, there is still considerable distance between agreeing that these things are important, and agreeing that they are the *only* things one need be concerned with in organizing a society. In the latter sense—as exclusive goals—Posner’s list is far from uncontroversial. Marxists (and many others) would suggest equality as a goal, theocrats and the Moral Majority would suggest a social order conducive to religious faith, and so on.

28. See, e.g., Epstein, *The Next Generation of Legal Scholarship?* (Book Review), 30 *Stan. L. Rev.* 635, 645 n.35 (1978).

29. Posner cites Epstein’s article, *id.*, as an example (p. 48).

30. In the first edition of *Economic Analysis of Law*, Posner wrote: “Bentham’s utilitarianism, in its aspect as a positive theory of human behavior, is another name for economic theory.” R. Posner, *The Economic Analysis of Law* 357 (1st ed. 1972). This statement does not appear in the comparable chapter of the second edition. R. Posner, *supra* note 17.

2, on Blackstone and Bentham, that he is no admirer of Bentham's, and that he believes that his own work owes much more to Blackstone than to Bentham. And sizable parts of chapters 3 and 4 are devoted to distinguishing wealth maximization from utilitarianism.

A. *Defects of Utilitarianism*

Posner begins his critique of utilitarianism with a description of the theory,³¹ including the short definition that utilitarianism is a system under which "the moral worth of an action, practice, institution, or law is to be judged by its effect in promoting happiness—the surplus of pleasure over pain"—aggregated across all of the inhabitants . . . of 'society'" (pp. 48–49).³²

Posner sees utilitarianism as suffering from a great number of defects, but they can be roughly classified into two groups: (1) those which make utilitarianism subjective, ill-defined, or otherwise indeterminate as a policy framework; and (2) those which stem from the "utility monster" problem, i.e., from utilitarianism's inability (or refusal) to distinguish between different types of pleasure, and from its willingness to sacrifice individuals for the sake of the greater social good.

1. *Determinacy Problems.* A system that requires judgments as to the pleasure and pain, or utility and disutility, to all beings, that are occasioned by a particular act, has an obvious measurement problem. Of course, since we accept the premise that people act rationally, some inferences about utility can be drawn from observing behavior (p. 13). Thus, when an individual does act *X* when he could just as easily have done act *Y*, it can be inferred that act *X* confers greater utility on the actor than act *Y*.

Sometimes utility can be expressed in monetary terms, at least as to maximums or minimums.³³ Thus, if *A* sells a book for two dollars, it can be inferred that he received less than two dollars' worth of utility from continued ownership of the book.³⁴ The very phrase "surplus of pleasure over pain"³⁵

31. It is of course an oversimplification to speak of "the" theory, since there are and have been many utilitarian thinkers, and as many variations on its central themes. The English lawyer-economist-philosopher Jeremy Bentham (1748–1832) is the acknowledged father of utilitarianism, and it is at his theories that Posner's criticism is principally directed.

32. The "surplus of pleasure over pain" phrase is from H. Sidgwick, *The Methods of Ethics* 413 (7th ed. 1907) (p. 49 n.4). Alternatively, John Stuart Mill wrote: "The creed which accepts as the foundation of morals Utility or the Greatest Happiness Principle, holds that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness." J.S. Mill, *Utilitarianism, Liberty, and Representative Government* 6 (1910 ed.) (1st ed. London 1861).

33. There is some debate among economists on whether utility can be expressed cardinally or only ordinally. For example, may one meaningfully say that one enjoys coffee twice as much as tea, or only that one prefers coffee to tea? See, e.g., D. Watson & M. Holman, *Price Theory and Its Uses* 66 (4th ed. 1977).

34. Somewhat more technically, it can be inferred that he receives less utility from the book than from having two dollars. This is really only one of the many inferences that can be made by comparing acts *X* and *Y* described in the preceding paragraph in the text.

35. See *supra* note 32.

suggests, however, that utilitarians are concerned with a very broad range of human needs, including many for which there can be no organized market, and no exchanges that can be valued in dollars, pounds, francs, hours of labor, or other readily calculable measure. Economists sometimes refer to "utils," or "utiles," as units of utility,³⁶ but usually as a didactic device, not out of any notion that utility can be precisely measured.

The difficulties of measuring utility are a major part of the indeterminacy problem. Posner writes of the "sponginess of the utility principle" (p. 42) and of Bentham's tendency to detect strong utility-maximizing effects in policies that he supported out of personal preference (p. 34).³⁷ But the indeterminacy problem of utilitarianism is not simply a matter of trying to design an objective util-o-meter. Posner identifies a number of other sources of indeterminacy. Do we maximize average utility per person, or total utility (p. 54)?³⁸ There are problems of domain: Do we maximize utility of all beings, or of human beings only (p. 52)? Do we have any basis for excluding foreign populations from the utility calculus (p. 53)?³⁹ Posner suggests that the implications of uncompromising utilitarianism are that it seeks "the maximization of the total amount of happiness in the universe" (p. 54)—including the happiness of animals and unborn beings, as well as people, wherever they may be. However, this approach leads to manifestly unsatisfactory social policies. For example, it may suggest that a driver who must choose between driving into a single child on one side of the road or a flock of sheep on the other should morally choose to drive into the child (p. 53).⁴⁰ To move away from this extreme position, one must look to some source of ethical guidance other than utilitarianism, since, as Posner asserts, utilitarianism affords no basis for distinguishing the happiness of sheep from that of children (p. 53).

2. *Utility Monsters.* The utility monster argument is in some respects an elaboration of the problem of competing utilities described in the sheep-child example. The argument consists of identifying situations in which pursuit of the surplus of pleasure over pain can lead to insane policies. Utility monsters may exist in a utilitarian state because there is no basis under utilitarianism for

36. See, e.g., D. Watson & M. Holman, *supra* note 33, at 67.

37. Posner notes in this regard that Bentham was "notoriously fond of animals, especially cats" (p. 34). The implication is that this had much to do with Bentham's suggestion that the utility of animals had also to be considered in determining what actions would maximize utility.

38. The implication of pursuing total utility is that reproduction should be encouraged as long as the utility of the marginal new life is greater than any disutility that may result from his presence. Thus, if the population could be tripled while average levels of happiness are halved, a utilitarianism based on total utility would embrace policies to produce that result, since total utility would be fifty percent higher (p. 54).

39. It might be noted in passing that these objections to utilitarianism seem only intermittently relevant to concrete legal doctrine. They would be crucial in the cases of abortion, destruction of the snail darter's habitat, or the like, but of no significance in most legal disputes.

40. Technically, since happiness is not purely a function of the total number of beings, sparing many sheep rather than one child is not a necessary implication of utilitarianism (though it is a possible implication in some factual situations). If one knew, for example, that sheep were chronically unhappy beings, it would be permissible to convert them to mutton by any available means.

distinguishing among types of pleasures and because utilitarian ends may sometimes be best served by imposing tremendous burdens on some for the sake of others.⁴¹ In the extreme example of utility-monstrosity, one may freely commit brutal murders, if the pleasure of doing so is sufficiently great. Modified—and less monstrous—versions of the argument suggest the possibility that society's aggregate utility might be maximized by transfers to super-consumers—pleasure machines whose capacity to enjoy things is for any reason much better developed than that of the average person.

Some of Posner's examples of monstrosity seem inapt. To illustrate the shortcomings of a system that does not distinguish among types of pleasure, he asks the reader to imagine that *A* enjoys pulling wings off flies, while *B* enjoys feeding pigeons, but somewhat less than *A* enjoys his sport. Posner asserts: "Putting aside the unhappiness of the fly, and the happiness of the pigeons, the consistent utilitarian would have to judge *A* a better man than *B*, because *A*'s activity adds more to the sum of happiness than *B*'s" (p. 57). But the monstrosity of the example stems from the visceral notion that even flies are undeserving of torture. And distaste for animal torture is served by utilitarianism very well: The "strict utilitarian" would surely object to "putting aside the unhappiness of the fly," and would probably (though not necessarily) conclude that *A*'s action was less exemplary than *B*'s, since *A*'s pleasure must be reduced by the flies' pain, while *B*'s pleasure calculus would benefit from the addition of the pleasure experienced by the pigeons that *B* feeds.

Nevertheless, though his examples make his demonstration of the inadequacies of utilitarianism less convincing than those of Nozick, Posner's critique is well-taken, and adequately explained up to this point. Utilitarianism has clear defects, and would not seem to provide a very solid basis for making judgments about individual actions or the social institutions that influence those actions.

B. Defects of "Kantian" Theories

Posner does not examine "Kantian"⁴² theories in any great detail. Because he starts with utilitarianism as a point of departure, however, and departs in a direction that he believes permits a much greater degree of personal autonomy, he anticipates that a reader may ask: "why should not society's ruling principle be the protection and enhancement of personal autonomy, rather than the maximization of wealth" (p. 98)? His response

41. The term "utility monsters" is apparently Nozick's. See R. Nozick, *supra* note 3, at 41. Nozick mentions "utility monsters" in the context of animal rights, but refers more generally to "monsters who get enormously greater gains in utility from any sacrifice of others than these others lose." *Id.* I will use the term somewhat more broadly in this Review, since Posner uses both "moral monstrosity" and "utility monster" in discussing problems of utilitarianism other than that noted by Nozick.

42. See *supra* note 26 regarding the use of this term.

could be said to be that Kantian theories, like utilitarian ones, have indeterminacy and monstrous elements.

The indeterminacy problem in Kantian theories stems from the fact that protection of autonomous rights requires that those rights be assigned in the first place. But what standard should govern? Posner suggests, for example, that Kantian analysis of automobile accidents has produced divergent results largely because it is unclear which of two conflicting activities—say, driving and being a pedestrian—has the primary right (p. 99).

The “monstrousness” of the personal rights approach results, in Posner’s eyes, from “moral squeamishness” (p. 58). It is a monstrousness not of the isolated individual action, but of its broader result, which result often stems from inaction rather than action. The example Posner uses is that of Jim, a guest of a military officer in a backward country. Jim is shown a group of political prisoners who are condemned to death, and is told that if he will shoot one of them, the remaining (presumably numerous) prisoners will be freed (p. 58).⁴³ If Jim respects the prisoner’s absolute right to live—a course generally dictated by theories emphasizing personal autonomy—all will die. This refusal to sacrifice one life to save many seems to Posner to be pure sentimentality, and thoroughly unsatisfactory as a basis for making choices among possible legal rules. Posner argues that it is possible to carve out exceptions from the absoluteness of personal rights, but that once one does so, one comes very close to engaging in the sort of balancing that the Kantians find so repugnant in utilitarianism (pp. 58–59).

C. *Superiority of Wealth Maximization(?)*

Having shown the defects of utilitarianism and personal autonomy theories, and having shown that wealth maximization is distinct from each,⁴⁴ it remains only for Posner to demonstrate that wealth maximization avoids the defects of the other two systems. It will be useful to analyze Posner’s approach in terms of determinacy and monstrousness.

1. *Determinacy.* Wealth maximization has a clear advantage over utilitarianism in that it attaches value only to willingness to pay. Since willingness to pay encapsulates both the desire and the ability to achieve ownership of a particular good, it is readily observable in market transactions. One need not be concerned with whether a poor man would get more utility from an expensive house than the wealthy man who actually buys it: the capacity to enjoy, unless backed up by the means to purchase enjoyment, is simply disregarded in a system of wealth maximization.

43. Posner attributes this example to Bernard Williams, *A Critique of Utilitarianism*, in J.J.C. Smart and B. Williams, *Utilitarianism For and Against* 77, 98–99 (1973).

44. The great bulk of Posner’s effort is in distinguishing wealth maximization from utilitarianism, presumably because they are often confused (p. 48). Posner no doubt believes—accurately I think—that there is little danger that anyone would mistake wealth maximization for a Kantian personal autonomy system.

This is not to say, however, that wealth maximization does not suffer from its own nagging problems of indeterminacy. One that is particularly troubling is an inherent circularity in the wealth-maximization theory: whether a policy will maximize wealth is a function of the willingness of individuals to pay for the affected goods or services, which is a function of the existing wealth distribution, which is in turn a function, at least in part, of the society's policies in prior time periods. Thus, under a wealth-maximization system, wealth distribution both determines and is determined by the social rules and institutions. Much has been written elsewhere about this problem.⁴⁵ It must suffice to note here that this problem is a variant of a problem in elementary price theory: price theorists analyze response to price changes in terms of "substitution effects" (the tendency to substitute other goods when the price of the examined good rises), but typically ignore "income effects"⁴⁶ (the effect of the price rise of the examined good on the ability of the consumer to purchase any good, including the one under examination), generally because a change in the price of any one commodity will have only an infinitesimal effect on income or wealth (p. 109).⁴⁷

Posner admits that there is some theoretical circularity in his wealth-maximization theory,⁴⁸ but denies that this has any practical significance. His response makes two points: (1) that this problem is illustrated exclusively by unrealistic examples (p. 109);⁴⁹ and (2) that any initial wealth distribution is altered over time anyway, so an initial wealth distribution cannot be a long-run determinant of policies consistent with wealth maximization (pp. 110-12).

This response is far from satisfactory. Posner clearly believes that this point has become tiresome,⁵⁰ but he may have underestimated the appeal of this challenge to his theory. To get some sense of that appeal, imagine two societies: society *A*, in which there are many poor individuals and a few very wealthy ones, and society *B*, in which wealth is distributed uniformly among

45. This problem constitutes an important part of the criticisms of Posner's wealth maximization advanced by Jules L. Coleman, see Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 Hofstra L. Rev. 509, 525-26 (1979), and Dworkin, see Dworkin, *supra* note 21, at 207. A discussion of the incompleteness problem in economic analysis created by the lack of independent sources of basic laws or rights that are needed as a starting position for further economic permutations is contained in Carroll, *Two Games That Illustrate Some Problems Concerning Economic Analysis of Legal Problems*, 53 So. Cal. L. Rev. 1371, 1373-76 (1980).

46. Posner more accurately calls them "wealth effects," though I believe "income effects" is the more common usage. In any case, despite the fact that income is not the same as wealth, "income effects" appear to be the same as "wealth effects." Whether expressed in terms of stocks (wealth) or flows (income), the point is that the resources available for consumption have expanded or contracted.

47. See also R. Leftwich, *The Price System and Resource Allocation* 89-93 (6th ed. 1976), for more complete explanations of substitution and income effects, including an explanation of why income effects are usually small. For brevity, I have stated the effect of rising prices, but the converse effects of falling prices are equally subsumed in these concepts.

48. Posner, *supra* note 9, at 786.

49. See generally *id.* at 786-87.

50. *Id.* at 786: "This point—that prices affect incomes affect prices—has been made and answered a number of times . . ." (Citing *The Economics of Justice*.)

all individuals. Though it is not certain, it is plausible that society *A* will attach a greater value—in terms of willingness to pay—than will society *B* to such goods as 80-foot yachts, private jets, and rambling mansions, and hence to laws favoring deep-sea sport fishing, general aviation, and exclusionary zoning. In society *A*, those laws may maximize wealth, while different laws might maximize wealth in society *B*. By itself, this raises the indeterminacy problem. But perhaps more important is that each society's laws may also tend, in a wealth-maximization system, to preserve the initial wealth distribution. If, for example, society *A* values exclusionary zoning, and arranges its rules to encourage it, exclusionary zoning will become cheaper than it would otherwise be. The wealth effect of lowering the price of goods consumed by the wealthy is to make that group wealthier. It is this possible "locking-in" aspect of wealth maximization that is troublesome; that effect stems directly from the circularity of determining wealth-maximization policies on the basis of some existing distribution of wealth, which distribution cannot be justified without reference to something outside of Posner's wealth-maximization theory.

Posner is also wrong in asserting that income or wealth effects are irrelevant in all but a few highly unrealistic hypothetical situations. He seems to believe that unless the income or wealth effect is greater than the substitution effect, so that it produces a counterintuitive net effect,⁵¹ the income or wealth effect is insignificant. But this ignores the possibility that even quite modest income or wealth effects would be critical in marginal cases. Imagine, for example, a classic competing use situation: *A* is an upstream industrial user of water, whose use of the water pollutes it; *B* is a downstream recreational user of water, whose intended use would be precluded if *A* is permitted to pollute the water. Assume further that no other parties are affected, and that *A* values his use at \$5500 and *B* values his use at \$5000. Conventional application of the Coase Theorem⁵² would suggest that, if transaction costs are zero (or sufficiently low) initial assignment of the right (either to pollute or to enjoy the water free of pollution) will not determine the ultimate use of the resource. If *A* is assigned the right to pollute, he will retain that right, since *B* would be unwilling to pay enough to induce *A* to forsake his right. On the other hand, if *B* is assigned the right to use the water free of pollution, it would be mutually beneficial for *A* to bribe *B* not to enforce that right, since any bribe between \$5000 and \$5500 makes both parties better off.⁵³

51. Most goods are "normal goods," meaning that consumption of the goods by a household increases as the income of the household increases. Some goods are "inferior goods," the consumption of which decreases as household income rises. It is possible that the demand for a particular inferior good could rise as its price rises (a highly counterintuitive result) if the effect of the price increases for that good erodes incomes enough. See D. Watson & M. Holman, *supra* note 33, at 99–100. The classic example (one that Posner cites at p. 109), is potatoes in Ireland during a period of shortage. If a large share of household income is devoted to potatoes, households may be so impoverished by an increase in potato prices as to be unable to afford substitute foods, most of which are more expensive.

52. See Coase, *The Problem of Social Cost*, 3 J. L. & Econ. 1 (1960).

53. Mark Kelman uses this example in his article, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 So. Cal. L. Rev. 669, 669–73 (1979), to illustrate his

But what if we add the additional and wholly plausible assumption that the value that *B* attaches to the clean water is influenced by his wealth. After all, value is expressed in terms of willingness to pay, not in terms of utility. If the right to use the water is worth more than \$5000 to *B*, then assignment of that right to *B* would increase his wealth by at least that amount. At that higher wealth, his willingness to pay for recreational facilities, such as clean water, would almost certainly be enhanced.⁵⁴ It is entirely possible that the value to *B* of the clean water might be \$6000, if the right to the water is assigned to him, but only \$5000 if the right is assigned to *A*. If it seems to the reader implausible that a \$5000 shift in wealth would produce an increase of \$1000 in willingness to buy clean water, the reader is invited to change the assumed facts slightly, so that *B* is willing to spend \$5400 to buy clean water if *A* is given the right to the water, and \$5600 if *B* himself is assigned the right to the water. The point is simply that it is conceptually plausible that there will be situations at the margin where a right will be valued most highly by whomever is assigned that right, since that party has—by the very fact of that right's assignment—the wealth to outbid the other. Assignment of a right confers wealth, wealth influences willingness to pay, and willingness to pay is for Coase and Posner the proper determinant of whom the right should be assigned to. There is no very definite way of measuring the importance of this circularity problem, but it can be noted that the greater the value of the right to be assigned, the greater the wealth effect, all other things being equal. Also, where the parties differ only modestly in their respective valuations of a particular right, even small variations in those valuations induced by wealth effects may prove to be determinative, if the legal system endeavors to assign rights to the highest value users. And it would seem that situations where the right in question is quite valuable, and the competing users attach similar values to that right, are precisely those situations where disputes requiring intervention of the legal system are likely to occur. Thus, the problem of circularity introduced by wealth effects is by no means trivial.

Wealth effects are not the only source of indeterminacy that Posner's critics have raised, however. Anthony Kronman⁵⁵ raises an indeterminacy problem that stems from wealth maximization's implicit assumption that the value of money is the same, no matter who holds it.⁵⁶ Kronman's example

argument that "opportunity income" and "realized income" diverge. He seems to think that this divergence is a phenomenon somewhat different from the wealth effect described in the text. *Id.* at 672 n.11. However, since this and most of Kelman's other examples do in fact involve wealth effects, it is by no means clear that resort to any other phenomena is necessary to explain the behavior Kelman describes.

54. It would seem that recreational facilities—such as sailboats, country club memberships, or backyard swimming pools, are highly unlikely to be "inferior goods." See *supra* note 51. Thus, *B*'s willingness to buy such goods should increase as his wealth increases.

55. Kronman, *Wealth Maximization as a Normative Principle*, 9 *J. Legal Stud.* 227, 230-31 (1980).

56. Posner does not state the assumption in quite this way, and Kronman does not state his objection in quite this way. However, that a dollar is a dollar is a dollar is a necessary consequence of wealth maximization's refusal to make interpersonal utility comparisons—its primary distinc-

focuses on the fact that the wealth-maximization view of a simple sales transaction—paying money for a book, say—is that a book moves to a buyer who attaches a higher value to the book than the seller does, and that money moves between parties who, by assumption, value money equally. Thus, the movement of the book maximizes wealth, but wealth is neither increased nor decreased by the movement of money. Hence, Kronman argues, wealth maximization is indeterminate on the question of whether there should be any movement of money.⁵⁷

Of course, in the market, the movement of book and money are linked. In Kronman's example, however, *A* and *B* have desires (unknown to each other) that are congenial to an exchange of book for money, but cannot accomplish the exchange without outside assistance because there is a high wall separating them. There appears an omnipotent *C*, who has the power to make transfers between *A* and *B* on any terms, but who cannot, for some reason, communicate with them. *C* is instructed to do what is morally right.⁵⁸ He clearly should transfer the book to the party who values it more, but what about the money?

There is a sort of indeterminacy in this problem, but it would not seem to be a very troubling sort. Indeed, the Coase Theorem⁵⁹ admits—even celebrates—this indeterminacy in identifying many disputes in which, absent transaction costs, the economist is simply indifferent as to which of two legal rules is adopted. Far from being a source of lament, it rather frees the lawmaker from abstruse questions of right, and focuses his attention on the presumably more concrete questions involving transaction costs, or who can (at the least cost) prevent the type of dispute in question from arising in the future.

Posner's actual reply to Kronman's argument finds determinacy in an analysis of transaction costs: he says that the transfer of money would not be costless, and that the efficient solution under Kronman's example would therefore be to transfer the book but not the money.⁶⁰ Posner admits that this may be an obnoxious result, but argues that it is not an indeterminate one.⁶¹

Actually, Posner need admit neither to obnoxiousness nor indeterminacy on this point. Kronman's example poses the possibility that valuable property may be transferred from *B* to *A* without compensation. The real-world analogues of such transfers—that is, conceivable transfers that achieve the same ultimate effect—are stealing, or perhaps the taking of property by the state without compensation. It can easily be demonstrated that laws that fail to afford a reasonable amount of protection against theft and uncompensated takings are not wealth-maximizing. In fact, Posner himself has done this ably

tion from utilitarianism. See *supra* notes 18–20 and accompanying text. That a dollar represents the same wealth no matter who holds it is also the source of Kronman's alleged indeterminacy.

57. Kronman, *supra* note 55, at 231–32.

58. *Id.* at 230.

59. Coase, *supra* note 52, at 19.

60. Posner, *supra* note 22, at 250–51.

61. *Id.* at 251.

in *Economic Analysis of Law*, where he argues that such failures to protect property rights lead to inefficiently low investments in property and inefficiently high investments in protection.⁶² Thus, the wealth-maximizer is by no means indifferent to the transfer of money from *A* to *B* in the Kronman example: he would endorse rules to effect payment for the goods, and thus to assure adequate compensation. This result is both determinate and satisfactory.

Whether or not the conceptual indeterminacy arguments of Dworkin, Coleman, and Kronman seem troubling, it does seem that there is a far greater problem for wealth-maximization theories: they are so difficult to apply to real legal problems that those theories may simply not be fruitful. Full elaboration of this charge cannot be provided here, but it can be explained in its highlights.

One of Posner's explicit assumptions is that the legal system is able to determine the facts necessary to a correct application of his theory (p. 75). This is, of course, a necessary premise of any jurisprudential system, but it may be a particularly difficult premise to accept in the case of wealth maximization. It is one thing for a court to determine, say, that *A* agreed to pay *B* three dollars in exchange for a book, and failed to do so upon tender of the book. It is quite another to determine all of the secondary and tertiary economic effects of all of the possible outcomes of the dispute presented. Economic analyses even of very simple legal problems often involve identifying—and, more importantly, estimating the magnitude of—externalities (costs and benefits accruing to persons other than the parties), transaction costs, information costs, risk preferences, etc. Choosing an example to illustrate this tendency in economic analysis is somewhat arbitrary, but I would cite Steven Shavell's recent elegant article on contract damages in the *Bell Journal*.⁶³ The article analyzes the effect of three generalized damage measures: "expectation," "reliance," and "no damages" (as defined in that article⁶⁴), in terms of whether or not they encourage Pareto-efficient⁶⁵ levels of reliance expenses

62. R. Posner, *supra* note 17, at 121-22.

63. Shavell, *Damage Measures for Breach of Contract*, 11 *Bell J. Econ.* 466 (1980). The academic economist's preference for modeling over empirical work appears not to be limited to analyses of legal issues. See Leontief, *Academic Economics*, *Sci.*, July 9, 1982, at 104, 107 (letter) (lamenting academic economists' preference for mathematical models over empirical studies).

64. Shavell, *supra* note 63, at 471. The "no damages" rule turns out to have the same effect as another rule Shavell considers, the "restitution" rule, under which any prepayments are returned in the event of breach. This is true because in a world of no contract damages, prepayments would be rare.

65. Shavell's work appears to employ a pure Pareto efficiency criterion rather than the modified, "Kaldor-Hicks" form of what might be called "potential Pareto efficiency" used in Posner's wealth-maximization theory. The difference, essentially, is that pure Pareto superiority requires that no one be worse off after the transaction than before, and that at least one party be better off. The Kaldor-Hicks form used by Posner permits some parties to be worse off, so long as the winners could compensate the losers for their losses. See pp. 88-92. However, in the contractual setting, this distinction loses its significance. The parties, knowing the damage rule, can convert potential Pareto superiority into actual Pareto superiority by varying the terms of the contract.

and Pareto-efficient incentives to perform the contract.⁶⁶ After proofs of several mediate propositions, filling some twenty pages with equations, Shavell concludes that the "expectation" measure encourages efficient performance levels, but inefficient reliance levels; that the "reliance" measure is inefficient in both respects; and that the "no damages" rule encourages efficient levels of reliance but inefficient levels of performance.⁶⁷ Thus, as a general matter, we have a stand-off; none of the damage measures is efficient on both counts,⁶⁸ and we are left with trading off one source of inefficiency, of uncertain magnitude, against another source of inefficiency, also of uncertain magnitude.⁶⁹ Furthermore, achievement of even this remarkably weak set of conclusions is possible only by use of several simplifying assumptions that significantly affect Shavell's results.⁷⁰

This tendency of economic analysis to identify competing concerns, but to provide no clear way of evaluating their magnitude is a serious obstacle to any practical applications. One can hardly turn a page of Posner's *Economic Analysis of Law* without encountering stand-offs of this sort.⁷¹ That there is a formal stand-off does not prevent Posner from reaching conclusions about the appropriate legal rules in particular cases. He does so, however, by making judgments about what the facts as to the magnitudes of competing concerns are likely to be.⁷² As a general matter, I find his judgments fairly sound; but that is simply to say that I often agree. His judgments are not, however, empirically demonstrable. Thus, one doubts that his judgments as to the wealth-maximizing rule in a particular case have any epistemological claim to superiority over Bentham's judgments—of which Posner is highly critical (pp. 33–34)—as to the utility-maximizing course.

But if wealth-maximization really is more determinate on a theoretical basis than is utilitarianism, does wealth maximization's indeterminacy problem resolve to one of simply waiting until all the data are in? Posner clearly thinks so. He refers frequently to the developing body of empirical research that justifies his economic approach to law.⁷³ He may be right. However, the

66. Shavell speaks of promoting "efficient breach behavior," Shavell, *supra* note 63, at 472, rather than of "incentives to perform the contract." The latter phrasing seems clearer, at least to lawyers, and does no violence to Shavell's meaning.

67. *Id.* at 472.

68. Indeed, one of Shavell's proofs is that no damage measure exists which is efficient on both counts. *Id.*

69. This is not to say that Shavell's article is not useful or interesting. It is both, and it is somewhat unfair for me to analyze it as though it were written for a judge deciding contract cases. I do think it provides a nice example of the aspect of economic analysis under discussion in the text, *viz.*, its tendency to identify countervailing economic considerations without quantifying them.

70. The best example is the assumption that the parties are risk-neutral; Shavell makes this assumption despite his explicit recognition that a major purpose of contract damages provisions may be to allocate risk between parties whose aversion to risk is unequal. Shavell, *supra* note 63, at 469.

71. These appear literally throughout the book; see R. Posner, *supra* note 17, at 55–56, and 71–73, for two especially clear examples.

72. The examples noted *supra* note 71 include judgments of this sort.

73. See, e.g., Posner's use of anthropological data at pp. 162–63, 168–69.

problems of obtaining the appropriate data, and achieving a good fit within an appropriately tight conceptual model, seem to me to be very substantial. They raise at least the possibility that scholars may ultimately decide that the wealth-maximization theory creates a paradox: that the information costs of applying wealth-maximization principles soundly in many areas of the law may be so high that the wealth-maximizing course is to abandon wealth maximization as a guiding principle.

2. *Monstrousness*. As I noted above,⁷⁴ the utility monster problem in utilitarianism appears to stem from both the fact that utility is unbounded and the fact that the utilitarian does not distinguish among types of pleasures. Posner seems to emphasize the latter in his criticism of utilitarianism, with his example contrasting the feeding of pigeons with pulling the wings off of flies (pp. 56–57). This is odd, since, of course, the wealth-maximization theory is no more fussy about the qualities of the pleasures available than utilitarianism is. Wealth maximization divides pleasures according to whether or not people are willing to pay for them, but by itself that does nothing to encourage pigeon-feeding and discourage wing-pulling. It would be perfectly consistent with wealth maximization to permit an entrepreneur to open an amusement park featuring a fly de-winging booth, at which freshly captured flies could be bought by patrons for de-winging.⁷⁵ Indeed, it would be inconsistent with wealth maximization to forbid such entertainment.⁷⁶

The superiority of wealth maximization as to the monster problem, Posner argues, is essentially that people can indulge only in pleasures that they are willing to pay for (p. 82). And because wealth—unlike utility—is bounded, it may be exhausted in the process (p. 82). The distinction from utilitarianism could be summarized as follows: in the utilitarian state, an individual with an enormous capacity for pleasure is permitted to act monstrously, and there is no conceptual limit to his monstrous behaviour, since his capacity for pleasure may approach infinity; in contrast, in the wealth-maximizing state, only the wealthy can afford to be monsters, and only then to the extent of their (necessarily finite) wealth.⁷⁷

I am willing to concede on this basis that wealth maximization is less monstrous conceptually than is utilitarianism. This does not prove, however,

74. See *supra* note 41 and accompanying text.

75. A more realistic example involving the same insensitivity to animals might be cockfighting.

76. In some sense, this provides an interesting interspecies example of the wealth effects discussed in the text at notes 45–50 *supra*. If the flies are assigned the rights to their wings, they probably would not sell those rights. If humans have the rights to pull off flies' wings, the flies will have no wealth with which to buy wing protection. A human altruist could theoretically use his wealth to buy off the rights of his fellow humans to de-wing flies, but flies have not been a species much in favor with philanthropists.

77. Though he does not put it in quite this way, Posner's argument here responds to Dworkin's concerns about imposition of "external preferences." See R. Dworkin, *supra* note 1, at 234–38, 275–78. Posner's view seems to be that the wealthy will not spend much of their wealth buying out the rights of the less wealthy. Hence, we need not worry (at least not much) about the polluting effects of external preferences in a wealth-maximization system.

that wealth maximization is even tolerably free of monstrosity. Posner himself identifies several transactions that have distinctly monstrous overtones, but which may be wealth-maximizing under conceivable factual situations: the Nazis might have paid German Jews to exile themselves (pp. 84–85), beggars might be enslaved (pp. 85–86), disabled individuals might be allowed to starve,⁷⁸ and rights to engage in torture might be bought and sold (p. 82). These things seem monstrous enough to me, though Posner would say I am being squeamish. Perhaps monstrosity is inevitably in the eye of the beholder.

D. *The Affirmative Case for Wealth Maximization*

As I noted above,⁷⁹ Posner does not for the most part argue his case for the moral superiority of wealth maximization in the conventional vocabulary of morality. The words “efficiency,” “utility,” “resources” and the like seem to appear with much greater frequency in *The Economics of Justice* than do words like “fairness,” “virtue,” and “goodness.” Here and there, however, the book provides some evidence that Posner has at least considered his theory in the light of the latter concepts, and found the results rather pleasing.

The principal reason why this is so—and the source of what moral flavor the book has—is that the process of creating wealth is to Posner one which is shared between the producer of the new wealth and society at large. This is inevitable in a society where most commerce takes place in a free market, since each party to a voluntary exchange must benefit or the exchange would not take place. As Posner puts it: “[L]awfully obtained wealth is created by doing things for other people—offering them advantageous trades. The individual may be completely selfish but he cannot, in a well-regulated market economy, promote his self-interest without benefiting others as well as himself” (p. 83).

Posner goes one step further with this point: if every wealth-increasing move an individual makes throws off wealth to those around him, it follows that the wealthiest individuals provide the greatest benefit to society.⁸⁰

Both the partial truth of Posner’s point and some of its limitations can be illustrated by a simple example. Suppose *A* has three apples and *B* has three oranges. The law of diminishing marginal utility suggests that each successive unit of apples and oranges is less valuable to each of them. Consistent with this law, assume that each gets from his own first piece of fruit (and would get from the first piece of the other’s fruit) four “utils,” or units of enjoyment;⁸¹

78. Posner, *supra* note 9, at 791.

79. See *supra* text accompanying note 20.

80. Posner does not quite say that wealth therefore connotes virtue; he does, however, label this effect “an important redistributive aspect of wealth maximization” (p. 82). Note also that it is the *production* of individual wealth, not its maintenance, that has this effect; Posner is not inimical to the “idle heir” who fails to augment his fortune, but neither are such individuals the objects of Posner’s approbation for their wealth-spreading effects.

81. To put this into Posner’s wealth-maximization terminology, let us say that “gets *x* utils from” is equivalent to “is willing to pay *x* for.” I prefer not to use the “willingness to pay” language because of its ambiguity in situations where there is a stable market price and a buyer who will obtain substantial consumer surplus by buying at that price. See *supra* note 20.

that each gets two utils from his (and would get from the other's) second piece, and one util from the third piece. At the outset (call this position 1), each has total utils, or units of enjoyment, of seven ($4 + 2 + 1$). If *A* were to approach *B* with an offer to trade an apple for an orange, *B* would presumably accept, and both would be better off. *A* would have traded his third apple (giving up one util) in order to obtain his first orange (worth 4 utils), and the converse would be true for *B*. Each now has a total utility of ten ($4 + 2 + 4$). (Call this position 2.) *A*'s initiative in suggesting the trade has benefited both *A* and *B*, in this case in equal measure.

Suppose, however, that *A*, because he has better information, or more guile, or whatever, offers instead to trade one of his apples for two of *B*'s oranges, telling *B* nothing about *A*'s apple inventory. *B* may plausibly accept the trade; after all, his second and third oranges are only worth a total of three utils to him and his first apple would be worth four. If he does accept the offer, he will have obtained eight utils ($4 + 4$), while *A* will have obtained twelve ($4 + 2 + 4 + 2$). (Call this position 2'.)

It would be hard to conceive of an argument for a society designed to hold the outcome of this example at position 1. The debate would surely be between position 2 and position 2'. At this stage of the example, the wealth-maximization theory would not clearly favor either of the two positions, since the aggregate wealth in each position is twenty. In fact, this example has much in common with Kronman's example,⁸² the point of which was to illustrate the indeterminacy of wealth maximization.

I would suggest, however, that, just as in Kronman's example, the indeterminacy may be resolved if one examines future incentives.⁸³ Since it was *A*'s initiative that produced the wealth maximizing exchange, the wealth-maximization theory would have some grounds for preferring position 2', which gives the greater incentive for *A*, obviously an industrious type, to find more such wealth-maximizing transactions in the future.⁸⁴

The aggregate implications of the possibility of reaching position 2' seem to me to undercut what I have called the moral flavor of *The Economics of Justice*. If we imagine a world of many *A*'s and *B*'s performing many iterations of the transactions described above, two things become clear. First, if everyone began with the same initial wealth, the wealthiest individuals at

82. Kronman, *supra* note 55, at 230-320.

83. Here, *B*'s second orange in position 2 would be *A*'s second orange in position 2'; since by assumption both derive 2 utils from the second orange, the second orange operates like dollars in Kronman's example, in that it has the same value to each party.

84. As a matter of strict logic, the wealth maximizer would not necessarily be compelled to opt for position 2'. He might argue that, as *A*'s situation at position 2 is clearly superior to his situation at position 1, there will be adequate incentive to maximize wealth whether we choose 2 or 2', and that nothing is gained by increasing the incentive. The question is whether it makes any sense to speak of differential incentives. In the real world, with a value for leisure factored in, I think it does, though it may not be clearly so in this model. In any case, the wealth maximizer has no basis for preferring position 2 to position 2'. He will either be indifferent or he will prefer position 2', in the belief that additional incentive either can't hurt, or may be necessary to cover transaction costs.

subsequent points are likely to include among their numbers the wiliest traders. Rather than "obtain[ing] wealth . . . by doing things for other people," (p. 83) this latter group will have obtained wealth by capturing for themselves as much as possible of the consumer surplus generated by the exchanges, leaving as little as possible for their trading partners.⁸⁵

A second consequence of permitting, or even encouraging, position 2' outcomes is that there would be a much greater dispersion of outcomes than under a system that encouraged position 2. Posner has insisted that the wealth-maximization system is essentially neutral as to wealth distribution (p. 81), and has even identified in the wealth-maximization theory some sources of equalization of wealth. It may be true that a high degree of wealth inequality may be a consequence of wealth maximization rather than a property of the theory. The preceding suggests, however, that it is at least a highly predictable consequence, and one that might well prove crucial for those who believe that inequality of wealth—particularly if it may very well result from wiliness, sharp dealing, and the like—lessens the justice of a society. This aspect of wealth maximization will be considered in the next section.

E. Consent, Equality, and Risk Aversion

Posner intended his wealth-maximization theory to steer a middle course between the concerns of utilitarianism and those of personal autonomy. The prototype of a situation in which the virtues of utilitarianism and autonomy do not conflict is the voluntary exchange of the sort outlined in the preceding section.⁸⁶ The exchange promotes utility, but does not threaten any basic right of either party.⁸⁷

But rules and political institutions come into play principally where the voluntary exchange mechanism fails: where *A*'s locomotive sparks have damaged *B*'s crops, for example,⁸⁸ or, more generally, where *A* and *B* have no contractual relationship, or have a contractual relationship that did not contemplate the situation that they find themselves in. This does not mean that the voluntary exchange model is inapplicable, but only that any application of the model is necessarily hypothetical. One must ask what the parties *would*

85. Actually, there may be two basic routes, and infinite intermediate combinations, to great wealth in the model outlined here: one could engage in a larger than normal number of transactions ending in position 2, or a normal total number of transactions, ending with regularity in *A*'s outcome at position 2'. That is, one may be either a prolific trader or a wily one, or both in varying degrees. Posner doesn't distinguish the two, but it would seem that only the former route to wealth deserves the kind things he has to say about the process of wealth creation. To make this more concrete, one could say that the wealth of one like General Wood (founder of Sears), who became wealthy by establishing a national merchandising network, seems more morally satisfying than the wealth of a man like John D. Rockefeller, who became wealthy by squeezing every possible drop of monopoly profit out of his oil cartel.

86. See *supra* text accompanying note 81.

87. This is true whether the outcome is at position 2 or 2'.

88. This splendid example of conflicting land use appears to have been first used by Alfred Pigou in A. Pigou, *The Economics of Welfare* (4th ed. 1932), and has subsequently been used by every scholar who has set pen to paper on the subject of law and economics.

have done about this problem had they anticipated it; to assure objectivity, one may add the condition that the parties would not know, at the time of the hypothetical agreement, which of the two (or more) positions in the problem they would ultimately occupy.

Applying this technique of analysis to the so-called "social contract" is of course not novel.⁸⁹ It has been much discussed in recent years, however, following the publication of Rawls's *A Theory of Justice*,⁹⁰ which uses this approach. Posner's wealth-maximization theory uses this approach as well, in the form of what he calls "ex ante" consent (pp. 94-95). As its name suggests, the ex ante consent notion holds that any outcome is just if the parties to the outcome agree prior to the event in question to the rules that would determine the outcome. Thus, the purchaser of a lottery ticket may be said to have consented to any loss that he incurs, absent fraud or duress (pp. 94-95). An essential but unstated premise of the wealth-maximization theory—one which, if valid, would give that theory much legitimacy—appears to be that individuals may be said to have given ex ante consent to any legal rule that maximizes wealth. Thus, wealth maximization is in some sense based on a notion of social contract.⁹¹

To contrast the views of Rawls and Posner on the social contract, it will be useful first to describe a hypothetical two-person society, and then to examine how Rawls and Posner would handle the wealth distribution question. Assume that the two individuals in this society know that one of them will turn out to be much more productive than the other—let us say three times as productive—but they don't know which of them will turn out to be the more productive one (*A*) and which the less productive one (*B*). Let us presume that they are considering three choices as to the distribution of the total product: one that allows each to keep all of what he produces, which we may call the "no-sharing" choice; one by which the total output is shared equally, called the "full-sharing" choice; and one in which *A* shares some of his output with *B*, but retains enough so that he has more product to consume than *B* has—the "some-sharing" choice.⁹² To make the illustration concrete, let us assume particular levels of output produced and distributed in terms of, say, bushels of wheat. We may construct the following hypothetical table, building in the wholly plausible assumptions that the some-sharing option blunts somewhat the incentive of each party to produce, and that the full-sharing option blunts such incentives to an even greater degree.⁹³ The options may be expressed as follows:

89. Jean-Jacques Rousseau's *The Social Contract*, first published in 1762, is perhaps the most famous example, but there are many.

90. J. Rawls, *supra* note 2.

91. Posner recognizes that this consent is not observable in any express form. Rather, it can be inferred from the assumption that people are rational and *would have* consented to arrangements that will maximize their expected utility (p. 96).

92. There are, of course, an infinite number of intermediate "some-sharing" options.

93. More precisely, the assumptions are: (1) that any sharing reduces the output of each; and (2) that the reductions in output are well-ordered, i.e., that greater degrees of sharing are

	No-Sharing		Some-Sharing		Full-Sharing	
	<u>Output</u>	<u>Income</u>	<u>Output</u>	<u>Income</u>	<u>Output</u>	<u>Income</u>
A	150	150	120	95	90	60
B	50	50	40	65	30	60
Total	200	200	160	160	120	120

Rawls's argument is that if the two individuals must agree to a distribution scheme before either has any information about whether they will turn out to be the more productive or the less productive individual, they will select the distributive option that maximizes the income of the less productive person, the "maximin" option, since that guarantees at least that level of income to each. It might be naively supposed that the full-sharing option would be the option that would maximize the income of the less productive individual, since transfers from the more productive to the less productive individual would continue to increase the latter's income until the point of full equality is reached. Indeed, it is possible that that could be the case, under some set of facts.⁹⁴ However, if we assume that the sharing of income operates as an disincentive to production, then both *A* and *B* are likely to be better off by less than full sharing: in particular, there will usually be some-sharing options in which *B* will obtain a smaller portion of *A*'s production than under full-sharing, but in which the increase in *A*'s production resulting from the reduced sharing will more than offset this. Of course, it is even possible that if relatively small amounts of sharing produce relatively large disincentive effects, there may be no distributive scheme that will improve *B*'s income over what it would be in the no-sharing case shown above.⁹⁵

Rawls, however, assumes that there are some-sharing positions that improve *B*'s outcome, and that the two individuals would select the particular some-sharing arrangement that maximizes *B*'s outcome. Although this ap-

associated with greater reductions of output. The disincentive effect of sharing on *A*, the productive individual, is fairly intuitive. The disincentive for *B* is less obvious, but it will exist as long as the sharing arrangement is specified so as to provide that *A* transfers to *B* some prearranged percentage of the difference between *A*'s output and *B*'s output. So specified, it is clear that any increase in *B*'s output reduces the amount of the transfer he receives from *A*, just as any increase in *A*'s output increases the amount of such transfers.

94. In general, if relatively large redistributions can be made with relatively small disincentive effects, *B*'s income will typically be maximized by full-sharing. One reason why this may be plausible is that the redistribution creates both a substitution effect and an income effect on *A*. The substitution effect is that taking away some of the marginal product of *A*'s labor tends to make marginal units of labor less attractive vis-a-vis marginal units of leisure. The income effect is that the redistribution reduces *A*'s income, which usually reduces an individual's demand for leisure. Since these effects cut in opposite directions, it cannot be demonstrated a priori that there will necessarily be any disincentive effect. As noted *supra* note 47, substitution effects usually outweigh income effects, but even if we assume that that is true here, it does not imply that the net substitution effect need be large. Note that *B* is also subject to income and substitution effects running in opposite directions. I have assumed, see *supra* note 93, that the substitution effect is stronger, but that need not always be the case.

95. This seems unlikely, but it is at least theoretically possible. In terms of the model I have described, this can be demonstrated as follows:

proach will result in greater income equality than the no-sharing option, it does not appear that Rawls attaches any independent importance to income equality: as in Posner's theory, any income equality is incidental.⁹⁶ Another way of putting Rawls's theory would be to assume that one of the individuals

The redistribution scheme is such that:

$$Y_B = O_B + s(O_A - O_B)$$

where Y_B = Income of B ,

$$O_B = \text{Output of } B,$$

$$O_A = \text{Output of } A,$$

and s = Proportion of A 's "excess" output (the amount by which A 's output exceeds B 's) which is redistributed to B .

But another aspect of the model is that output levels of both A and B are influenced by the redistribution. Thus, our equation should be restated as:

$$Y_B = (1 - d) O_B + [(1 - d) \times s \times (O_A - O_B)]$$

where d = the percentage reduction of production from the "no-sharing" state associated with a particular sharing proportion s .

and O_A and O_B are redefined as output levels in the "no-sharing" state.

Factoring the right side of the equation gives us:

$$Y_B = (1 - d) (O_B + sO_A - sO_B)$$

And, since $O_A = 3 \times O_B$, by one of the basic assumptions of the model, the equation can be restated:

$$Y_B = (1 - d) (O_B + 3sO_B - sO_B)$$

or

$$Y_B = (1 - d) (O_B + 2sO_B)$$

Factoring out the O_B yields:

$$Y_B = O_B (1 + 2s) (1 - d)$$

And since $Y_B = O_B$ in the "no-sharing" state, for B 's income to increase through a sharing arrangement, the following must be satisfied:

$$(1 + 2s) (1 - d) > 1$$

Solving this inequality for d yields:

$$d < \frac{2s}{2s + 1}$$

And, conversely, any time that

$$d \geq \frac{2s}{2s + 1}$$

is satisfied, the "no-sharing" state will maximize Y_B .

My model lacks generality in several respects, viz., it assumes that there are only two parties, that there is a particular ratio of the two parties' outputs, and that the value of d is the same for both parties. I believe that the essential point, i.e., that "no-sharing" may be the option that maximizes B 's income under some circumstances, would survive increased generality of proof.

96. This is clearest in Rawls's discussion of envy. J. Rawls, *supra* note 2, at 530-41.

knew that he would turn out to be the worse-off party, but also that he had the power to set the sharing proportion. If he acts only to maximize his own income, he will not opt for absolute equality, but for the Pareto optimal some-sharing solution that makes both individuals better off (compared with full-sharing).

Posner's response to this is based on a variant of Pareto optimality generally referred to as the Kaldor-Hicks criterion, or potential Pareto optimality (p. 91). The essential difference is that, while strict Pareto optimality requires that both parties be better off after the transaction than before, potential Pareto optimality permits transactions in which one party improves his position and another worsens his position, so long as the amount of improvement to the first party is sufficiently great that he could compensate the second party for the latter's worsened position.⁹⁷ Applying a potential Pareto optimality analysis to Rawls's model produces the conclusion that the parties would reach an agreement not to share output—the no-sharing option. The no-sharing option maximizes total output (assuming that sharing is a disincentive to production), and since the two individuals believe they have an equal chance of enjoying the higher income, the no-sharing option also maximizes the expected value of the outcome to each.⁹⁸

The difference in the two positions resides in assumptions about risk aversion. Rawls is at one extreme, implicitly assuming complete risk aversion. Posner is at the other, implicitly assuming complete risk neutrality.⁹⁹ Rawls's theory would suggest that the two individuals in the example would surrender any amount of additional income for *A* in order to give a single penny more to *B*. Posner, on the other hand, assumes that the parties would be completely indifferent to the income of the less productive individual, as long as amount of total income, and hence of the expected value of income, were maximized.

More plausible than either of these extreme positions is that the truth is somewhere between them. A brief examination of the numerical example described above¹⁰⁰ is enough to raise doubts about Rawls's conclusion. Note that either individual in that example, believing that he was equally likely to end up being *A* as he was of being *B*, would view the movement from the no-sharing option to the some-sharing option (Rawls's preferred option)¹⁰¹ as involving a fifty percent chance of gaining 15 (if he ended up as *B*) and a fifty percent chance of losing 55 (if he ended up as *A*). We can't say for sure how

97. See *supra* note 65.

98. The expected value of the outcome is equal to the sum of each possible outcome weighted by its probability. In the model described *supra* note 95, it can be shown that the expected value will be maximized by the no-sharing option for all positive values of *d*.

99. Actually, the opposite of risk aversion is a positive preference for risk. However, I am aware of no social theory premised on the notion that people in general prefer risk. Thus, Posner's position is at the extreme of those positions of which I am aware.

100. See *supra* text accompanying note 92.

101. I am presuming, for purposes of evaluating Rawls's theorem, that he is right in believing that there exists a some-sharing option that maximizes *B*'s income.

he would view this trade-off, but it is certainly possible that, at these odds, he would view the no-sharing option as an acceptable risk.¹⁰²

On the other hand, the assumption of zero risk aversion seems equally suspect. Suppose that a fairly modest amount of sharing, say ten percent of the difference between *A*'s output and *B*'s output, is associated with only a minute amount of incentive erosion. (After all, even at the margin, *A* would keep nine-tenths of all his product.) Suppose that the following is the output and income under a ten percent sharing arrangement (i.e., where ten percent of the amount by which *A*'s output exceeds *B*'s is transferred from *A* to *B*):

	<u>Output</u>	<u>Income</u>
A	149	139
B	49	59
Total	198	198

If this were the case, either individual's evaluation of this option might be to note that, at a cost in expected value of only one percent, he would "buy" an eighteen percent improvement in his worst-case outcome.¹⁰³ Again, one cannot be sure what he would choose, but it is far from clear that he would choose the no-sharing option, even though it is by assumption the wealth-maximizing choice. In short, Rawls and Posner both seem to be making assumptions about appropriate risk-taking and the disincentives of sharing arrangements, but those assumptions are both undemonstrable and intuitively unlikely.

It also seems worth noting again that neither Rawls¹⁰⁴ nor Posner (p. 81) has viewed relative equality of outcomes as an independent value. An extreme form of the argument for approximately equal outcomes is implicit in Richard Easterlin's hypothesis to the effect that *relative* income and wealth are what produce happiness, not *absolute* income and wealth.¹⁰⁵ Technically, full acceptance of this argument would make wealth maximization and Rawls's maximin theories simply irrelevant, since both operate on the absolute amounts of income and wealth. However, it is possible to conceive of variants on Easterlin's formulation that would suggest that inequality imposes a cost on society. Suppose that the relatively poor experience profound suffering from inevitable association with those wealthier than themselves; and suppose

102. An exception to this would be where 60, say, is a subsistence level of income. The two individuals would presumably trade large amounts of possible upside gain to avoid the possibility of having an income below subsistence level.

103. In this model, the expected value is simply the total output divided by two. Thus, the expected value of the outcome in the no-sharing state is 200 divided by 2, which equals 100. This declines by one percent in the some-sharing state assumed in this example to 198 divided by 2, which equals 99. *B*'s outcome in this some-sharing state improves to 59, compared to 50 in the no-sharing state.

104. J. Rawls, *supra* note 2, at 530.

105. See Easterlin, *Does Money Buy Happiness?*, 30 *Pub. Interest* 3 (1973).

that while the wealthy experience some satisfaction with their wealth, that satisfaction is reduced by guilt over how they acquired it and anxiety over how they might lose it. In such a society, policies that increase total wealth but also tend to increase the dispersion of wealth—as I have argued the wealth-maximization theory does¹⁰⁶—may not be beneficial.

Oddly, both Rawls and Posner observe that inequality of wealth may produce incentives to crime and other behavior that would reduce the minimum income (for Rawls)¹⁰⁷ and the aggregate wealth (for Posner) (p. 145). But they do not regard unhappiness over income distributions as a cognizable cost unless that unhappiness ripens into antisocial behavior. In large part this seems to be a moral judgment, reflecting the unworthiness of envy as a determinant of justice.¹⁰⁸ But this is a satisfactory response only if inequality were the result purely of effort, or of choices about investments in human capital. To the extent that inequality stems in large part from social class, parentage, native ability, or fortuity, then the “envy” shades more toward a legitimate question of the justice of inequality so determined.¹⁰⁹ This is at the heart of the criticism of Posner from the left, but Posner leaves it largely unconsidered.

II.

The bulk of this Review has focused on what might be called the core of Posner's wealth maximization theory, as described in part I of *The Economics of Justice*. The other parts of the book have much less to do with Posner's normative theory than part I does. However, part II, entitled “The Origins of Justice,” and part IV, entitled “The Supreme Court and Discrimination,” do provide Posner with some opportunities to apply normative analysis to concrete legal problems, and provide critics with some opportunities to observe concrete shortcomings of Posner's theory. A comprehensive analysis of all the points raised in these latter parts of the book is unnecessary to the purposes of this Review. Rather, a few more or less unconnected observations drawn from these parts will illuminate some of the theory's serious problems.

A. “*The Origins of Justice*”

Part I of the book, comprising chapters 5 through 8, covers three related topics. Chapter 5 examines the version of the subminimal state that Posner has discovered in Homer's epic poems the *Iliad* and the *Odyssey*. Chapters 6 and 7 examine the economic basis of the law and institutions of primitive societies. Chapter 8 discusses retribution and related concepts of punishment.

106. See *supra* notes 80–87 and accompanying text.

107. J. Rawls, *supra* note 2, at 531.

108. *Id.* at 530.

109. For an examination of the sources of inequality, see C. Jencks, *Inequality: A Reassessment of the Effect of Family and Schooling in America* (1973).

1. *The Homeric State*. Posner undertakes in chapter 5 to examine how social order was maintained in the primitive society depicted in the Homeric epics. The purpose of this exercise is to rebut the notion that some sort of state, if only of the "nightwatchman" variety, is necessary for a society to function (p. 119).¹¹⁰ This effort is at all points entertaining and interesting, but very difficult to take seriously. The trouble is that it is quite unclear that the Homeric epics are a satisfactory source for a description of a primitive society.

The most important problem is the most obvious one: that the epics are essentially works of fiction. They are based on actual events, but are unreliable as to the accuracy of detail. Posner shows some sensitivity to this problem, admitting that the society of the epics is "fictive in many of its details," (p. 119 n.2)¹¹¹ but his sensitivity seems to wax and wane. For example, he draws important inferences about the difficulty of effective management of the efforts of others in the absence of governmental authority from the fact that Odysseus was able to slay the 108 suitors of Penelope by himself: Posner suggests that Odysseus prevailed *because* he was working alone, not in spite of that fact, a suggestion that seems quite obtuse. Another fact that Posner finds highly significant—and accepts as literally true—is that Odysseus took a full twenty years to find his way back to Ithaca after the victory at Troy (p. 126). A more skeptical reader of the *Odyssey* might note that the long absence adds poignancy, and the solo destruction of the suitors adds an element of awe to the narrative.¹¹² This is, after all, an epic poem, not a parable from the *Harvard Business Review* on the perils of management without proper authority. Nor are these isolated examples; Posner repeatedly draws inferences from fragments—a fact stated here, coupled with an omission somewhere else—to reach sweeping conclusions about the nature of the Homeric state.¹¹³

This tendency to use narrative "facts" as the basis of inference would be less troubling if there were many sources—even fictional ones—to draw upon. In that case, it would be much easier to sift the factual from the fictive in each work. This chapter, however, is based almost entirely on the two epic poems, and to a much lesser degree on secondary materials about them written many

110. If proven, this would clearly raise the possibility that a successful society could be based on anarchy. Posner disavows any interest in advocating anarchy, however, which leaves one wondering just what his purpose in this chapter is. Perhaps it is merely to clear away a bit of deadwood from those theories which begin with the premise that a state is a precondition of social order.

111. He hardly has any choice about admitting to this, since the poems are full of magical happenings (men turned into swine, and the like) that go far beyond being merely improbable.

112. However, Posner recognizes the dictates of mythic plot construction in at least some contexts. He notes at one point, for example, that "the point of Achilles' divine parentage is to give a reason why he is such a powerful fighter" (p. 141).

113. For example, Posner notes a paradox about Homeric government: that it has "a structure but virtually no functions" (p. 126). He concludes that it has no functions because the poems contain little or no description of such functions. But perhaps the structure had narrative usefulness—identifying the kings and nobles who are the principal actors, for example—but the functions did not. To suggest that structure without function is a paradox is to admit that the inference lacks plausibility, but Posner draws the inference anyway.

centuries later. Posner has no real alternative: no other comparably complete writings from the period have survived. But the dangers of close reasoning from isolated sources is great. Imagine a forty-eighth-century counterpart of Richard Posner piecing together an essay on legal procedures in early twentieth-century Europe if Franz Kafka's *The Trial* is the only surviving work.

2. *The Economic Basis of Primitive Law*. In chapter 6, Posner describes a model of primitive society, and in chapter 7 he offers an economic explanation of the rules and institutions found in such primitive societies. Like the material on Homeric society, these chapters offer many interesting insights. Unlike the Homeric materials, they seem to have more manageable data reliability problems.

Posner's primitive society assumes that: (1) there is no effective government; (2) the society is capable of producing only a few kinds of goods; (3) trade between societies is very limited; (4) the "consumption goods" produced are perishable; and (5) private gains from innovation are negligible (pp. 151–52).

An obvious problem in such a society is that it is virtually impossible to create a store of wealth. That basic truth about primitive society requires that many of the fundamental notions of economics be modified. Temporary wealth can exist—in the form of a good harvest, for example—but since it cannot be stored, and cannot be traded for any commodity that is more durable, other uses for the temporary wealth must be found. The principal use Posner identifies is that the temporary wealth is given away, but not out of any particular benevolence (p. 153). Posner identifies two motivations for such giving: to provide "insurance" of a sort—buying an obligation from the donee to reciprocate at some future time (pp. 153–55); and to provide information—something of an advertising function, indicating that the donor is a productive individual with whom future association is likely to be valuable (p. 170).

This basic insight, Posner believes, explains much of the behavior of primitive peoples that might otherwise be thought inconsistent with economic theory.¹¹⁴ But one wonders if Posner is not again trying to get too much mileage from not enough fuel. Posner recognizes that the assumption about the perishability of goods is "an exaggeration," (p. 152), but since food is the most important product of a primitive society, Posner apparently believes that the assumption of complete perishability is acceptably accurate. However, even in primitive societies some durable goods are produced—animal skins and furs, small tools, perhaps tents, rafts, or canoes, or even domesticated animals. As long as such goods are a significant part of a society's production,

114. An alternative economic explanation of behavior in primitive economies can be inferred from J. Scott, *The Moral Economy of the Peasant: Rebellion and Subsistence in Southeast Asia* (1976). Scott paints a view of primitive society that sounds rather Rawlsian—one in which risk aversion controls everything, since the cost of losing any gamble in a subsistence economy may be starvation.

isolated surpluses of agricultural perishables could be traded for those more durable items, and wealth could be stored in the latter form.¹¹⁵

The problem, of course, is that crop surpluses are not typically isolated, depending as they do primarily on favorable weather, which is likely to prevail over an entire region, not just one or two farms. This is what makes agricultural prices volatile. The problem of primitive society then may not be wealth storage after all, since large stores of perishable commodities which are at the time abundant do not constitute even temporary wealth. Such commodities are simply not very valuable. But under such circumstances, one wonders how much "insurance" or "advertising" value they could command. An example that Posner cites, which seems to illustrate this effect at its extreme, is the "potlatch" practices of some Northwest Coast Indian tribes, in which certain goods are destroyed in the course of an annual winter festival (pp. 157, 170). Posner suggests that this practice, "sometimes regarded as pathological, . . . can be interpreted as an especially credible method of signaling the possession of wealth" (p. 170). In terms of its private costs, this could be the Indian equivalent of lighting one's cigar with a hundred-dollar bill, which is apparently intended to send a similar signal. To the society at large, the cost is much greater: burning currency is in some sense a transfer payment to all other holders of currency; burning goods uses up real resources. Willful waste of valuable resources is not something that traditional economics can comfortably explain. To Posner, however, this is not waste, but simply a purchase of advertising—presumably of value equal to or greater than the value of the goods destroyed. But is it really plausible that this was the most efficient purchase of such advertising? For example, could not precisely the same message be sent by simply putting the goods out for anyone to take? If the goods are really valuable, this should attract attention; it would convey the original owner's disdain for the goods, presumably because he has so many such goods; and it would involve much less social cost.

An alternative explanation is that the particular goods chosen were not very scarce, and were hence of low value.¹¹⁶ But, again, if the goods are of low value, can they really be "an especially credible method of signaling wealth"? If the general answer to this question is, as it seems it must be, that resources given away or destroyed were typically not very valuable, then it seems implausible that transactions of this sort would have had great significance in primitive societies. Yet Posner infers much about the structure of primitive institutions from this "insurance principle" (pp. 153-63), as he calls it.

Another alternative explanation is one that Posner would find too awful to entertain even briefly: it may be that "potlatch" and other primitive

115. Posner recognizes that trade for "capital goods" might take place, but he identifies women as the most important capital good in such societies, and notes that, because of kinship obligations, they provide an alternative form of crop insurance (p. 153).

116. Note that the goods must be known generally to be abundant for them to have a low value. If some segment of the society believes the goods to be valuable—which segment would then be impressed by the public destruction of the goods—then the goods do have value in trade, at least to that segment.

practices are not much influenced by economics and not well-explained by economic analysis.¹¹⁷ One of the irritating features of the economic analysis of law movement is its implicit insistence that economics can explain absolutely everything, and in fact offers the *best* explanation of absolutely everything. If the reader is inclined to be irritated by this, the economic analysis of potlatch may well finish him off.

The lengths to which Posner is willing to go to explain the law and institutions of primitive societies in economic terms contrasts strikingly with his harsh criticism of more modern institutions. Virtually all of part II of *The Economics of Justice* is a celebration of the power of economic analysis to illuminate one seemingly bizarre primitive practice after another, but parts III and IV consist principally of suggestions that contemporary American courts, and particularly the Supreme Court, seem chronically incapable of pursuing a wealth-maximizing course. It would appear that civilized, modern man is capable of gross economic foolishness—especially when clothed in the robes of a Supreme Court Justice—while primitive man could do no wrong. Perhaps this is an accurate perception, but why should it be so? Is there a latent “noble savage” aspect to Posner’s theory?

More likely, Posner’s explanation would rest on the inference that primitive practices must have been sound, since those societies were “successful,” in the sense that they survived. In contrast, the Supreme Court jurisprudence of the last three decades may be merely an aberration—a brief interregnum, as it were, during which the invisible hand lost its grip on its scepter.¹¹⁸ This view would be consistent with the sort of neo-Darwinism with which Posner seems enamored,¹¹⁹ and bears some similarity to Paul Rubin’s explanations of why the iterative nature of the common law produces efficient results, though not necessarily in the short run.¹²⁰ Posner makes no real effort, however, to prove that, say, tribes practicing potlatch were more likely to survive than those that did not. More generally, there is little or no attempt to distinguish more from less successful societies. Though chapters 6 and 7 appear scientific,¹²¹ com-

117. The suggestion that economics can only explain a part—albeit an important part—of social behavior has been most artfully made in the late Arthur Leff’s delightful mock-anthropological article, *Law and*, 87 Yale L.J. 989 (1978).

118. One alternative explanation is suggested by Posner: that contemporary societies may be wealthy enough to survive their inefficiencies, whereas primitive societies may not have been (p. 205).

119. For example, there are frequent references to sociobiologist Edward O. Wilson (see *supra* note 13 for citations). Also, Posner himself frequently engages in this sort of analysis. See, e.g., p. 210, wherein Posner suggests that hot-tempered retaliation may be genetic, in that it may be correlated with survival.

120. See Rubin, *Why Is the Common Law Efficient?*, 6 J. Legal Stud. 51 (1977). See also Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. Legal Stud. 66 (1977).

121. There is at least some actual data, though Posner does not devote any significant space to hard examination of the data. See, e.g., pp. 162–63, at which Posner evaluates some commercial characteristics of 15 primitive and 15 advanced societies, and pp. 167–68, at which Posner evaluates the relationship between tolerance of polygyny and political orientation. Neither of these statistical presentations contains, for example, any analysis of how probable it may be that random variation could have resulted in the patterns Posner perceives.

pared with the discussion of Homer that precedes them, they are ultimately unconvincing on many of their main points.

3. *Retribution.* In chapter 8, "Retribution and Related Concepts of Punishment," and in the latter part of chapter 7, Posner examines some of his criminal law theories in the context of a primitive society. Like the other chapters in part II of the book, this one sparkles with ingenious economic explanations of phenomena not generally thought to be economic. Some of those explanations seem sound, others hopelessly facile. That naked opinion is perhaps unhelpful, but thorough review of the explanations would be tedious. Perhaps it will suffice to cite a single example, which may illustrate both aspects.

Posner reviews evidence that criminal law is, in very primitive societies, almost wholly private, operating through familial revenge and compensation devices (pp. 203-04). However, as the nascent government takes shape, a public criminal law comes into being, prohibiting murder, among other things. Posner considers a couple of explanations for this, but finds the most satisfying explanation to be that murder imposes a cost external to the victim and the murderer—a cost borne by the state for the loss of one of its citizens (p. 204). But one wonders how deeply this motivation goes. The "damage to the state" analysis would seem to imply a kind of refinement that is not typically made in criminal law. For example, the damage to the state may be great if the victim is a young, vigorous farmer, a good taxpayer in peace and a good soldier in war; the economic damage to the state may be negligible if a poor, disabled person is the victim. Yet laws against murder are not typically refined along those lines, and one suspects that something besides Posner's economic explanation is at work. This suspicion is reinforced by the observation that tort damages in wrongful death actions are indeed based on the economic value of the victim to the plaintiff. The refusal of the criminal law to consider this factor in meting out punishment thus cannot easily be explained as the moral squeamishness of a legal system unwilling to acknowledge the function it is in fact performing.

Posner's analysis of punishment also raises some further doubts about his suggestion that ex ante consent produces just outcomes.¹²² His analysis suggests that highly uncertain punishment for criminal behavior is entirely acceptable (and may even be most efficient, since it economizes on enforcement costs), as long as the punishment is sufficiently severe that the expected value of the punishment (actual punishment discounted by the probability that it will not be applied) is equal to the cost of the criminal behavior. Thus, a punishment that is ten times as severe as the crime merits, but that is assessed against only one out of every ten perpetrators, is acceptable. The ex ante consent paradigm might consist of imagining one hundred souls yet unborn, who know that ten of their number will become criminals. It would be

122. "Economic analysis suggests that a combination of low probabilities [of punishment] with very severe penalties frequently is optimal . . ." (p. 198-99).

consistent with Posner's wealth-maximization theory to imagine that this group of one hundred would agree to minimize enforcement costs (in order to maximize wealth) by punishing only one of the ten, but would also decide, in order to maintain proper incentives, to exact a ten-fold punishment from the single unfortunate criminal who is punished.

This approach may be wealth-maximizing,¹²³ but it does not seem just. While this is not provable, I strongly suspect that most people would view the combination of ten-fold penalties with one-tenth probabilities of conviction as one that punished some perpetrators with unjust severity while unjustly omitting punishment altogether as to most other perpetrators. An approximate evenness of punishment, in which most perpetrators bear roughly the right amount of punishment, is far more ethically satisfying. A society may rationally choose not to have such a criminal justice system, since the costs of approaching certainty of punishment are very high. But it would seem that when a society chooses to have low probabilities of punishment and severe punishments, it is not pursuing justice through wealth maximization, as Posner would have it. Rather, this seems to be a situation in which wealth maximization and justice are competing goals, and the society in question has simply selected a criminal justice system that "buys" as much justice as it feels it can afford.

B. *The Supreme Court and Discrimination*

The final part of the book presents Posner's analysis of the economics of discrimination, followed by a discussion partly in those terms of the *DeFunis*, *Bakke* and *Weber* cases.¹²⁴ The economic background proceeds along the familiar lines of Gary Becker's analysis of discrimination.¹²⁵ The central insight is that racial or ethnic discrimination will generally impose costs on those who discriminate as well as those who are discriminated against. At some risk of oversimplification, the mechanics of this can be described briefly. Imagine that at some point there are fixed numbers of white laborers and black laborers of identical qualifications and productivity. Assume further that many employers, as a matter of taste, prefer to hire white workers. Those employers, in competing for the fixed number of white workers, will bid up the wages of those workers, opening a differential between the wages of the whites and blacks. Those who persist in their preference for white workers will then be paying a premium for the privilege of indulging in that taste.

In competitive markets, employers who are free of racial prejudice will enjoy a competitive advantage, and should ultimately come to dominate those

123. Then again, it may not be wealth-maximizing. If criminals as a group prefer risk, or are less likely to be rational maximizers of their utility (being, arguably, pathologically self-destructive) this system will not produce optimal levels of crime.

124. *De Funis v. Odegaard*, 416 U.S. 312 (1974); *Bakke v. Regents of the Univ. of California*, 438 U.S. 265 (1978); *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979).

125. G. Becker, *The Economics of Discrimination* (2d ed. 1971).

markets—eradicating the racial discrimination in the process. In monopolized markets—labor unions being the principal source of monopolies in labor markets—this tendency is much blunted. The monopolist's monopoly profits may be reduced, but if the monopoly is protected by law or otherwise, it may survive despite its inefficient racial discrimination.

Posner identifies another source of discrimination that is not inefficient, however. This sort of discrimination is based on an effort to economize on information costs.¹²⁶ Another simple example will make this clear. Suppose a tulip grower can buy red bulbs or yellow bulbs; red bulbs are 90% likely to bloom, and yellow bulbs 80% likely to bloom. Suppose also that physical inspection of the bulbs can perfectly cull out those that will not bloom, but that such examination costs \$.15 per bulb. Suppose finally that bulbs of both colors are initially priced at \$1.00, and that the bulb buyer is indifferent to the color of the bulb. The bulb buyer then faces an array of choices that may be summarized according to the price per bloom as follows:

- | | |
|--|--------------------------------------|
| 1. Select only yellow bulbs,
no inspection | $\$1.00 \div .8 = \1.25 per bloom |
| 2. Select only red bulbs,
no inspection | $\$1.00 \div .9 = \1.11 per bloom |
| 3. Select equal mix of bulbs,
no inspection | $\$1.00 \div .85 = \1.18 per bloom |
| 4. Inspect bulbs, buy only ones
that will bloom | $\$1.00 + .15 = \1.15 per bloom |

A fifth option might be to offer \$.89 for yellow bulbs, the differential being calculated to produce a price per bloom of \$1.11.¹²⁷ But suppose there is a law requiring that bulbs of all colors must be priced at the same level.¹²⁸ In that case, the most efficient option for the bulb buyer is to buy only red bulbs. This is true despite the fact that a substantial majority of the yellow bulbs are as good as the red bulbs. The role of information costs is crucial: if the cost of inspecting could be lowered from \$.15 to \$.10, the best course would be to inspect each bulb, an approach that would lead to the purchase of a substantial number of yellow bulbs.¹²⁹

126. This view is based on the work of Kenneth Arrow, Edmund Phelps, and others. See, e.g., Phelps, *The Statistical Theory of Racism and Sexism*, 62 *Am. Econ. Rev.* 659 (1972).

127. Since $.89 \div .8 = 1.11$ (approximately).

128. This assumption is implausible as to bulbs, but perfectly plausible in the discrimination situation for which the bulbs are a metaphor.

129. Of course, in the present model, it would still be more efficient to inspect only red bulbs, since fewer of them would have to be inspected to produce any given number of blooms. But we may assume a modest refinement of the model, viz., that it costs one cent to perform a preliminary inspection to determine if the bulb is a red bulb or a yellow bulb, and that the two types of bulbs are mixed in equal numbers in the bins from which bulbs are drawn. The two strategies for selecting bulbs available under these assumptions are (1) to reject all yellow bulbs immediately, and inspect only red bulbs; or (2) to inspect either type of bulb. The costs of finding bulbs that will produce 100 blooms under strategy 1 is $100 \times \$1.00$ (the cost of buying the bulbs),

Applying this hypothetical example to contemporary instances of employment discrimination requires that a few controversial but not wholly implausible assumptions be made. One could imagine, for example, that a particular job as a clerk required basic literacy and computational skills, and also that timeliness and reliability of attendance at the workplace were qualities much valued by the employer. It seems likely that the first set of skills would be influenced by the employee's educational background, and the second set influenced by the work experience of the employee's parents. It also seems likely that, at the present time, more blacks than whites have suffered from inferior primary and secondary education, and more blacks than whites have been reared in families in which no adult was regularly employed. Thus, even though it is possible that most blacks and most whites would make satisfactory employees, the failure rate might well be somewhat higher for black employees. Further, the information cost that would be incurred to resolve uncertainty regarding a potential employee's probability of success might be significant. Under such circumstances, it is possible that an employer could find it efficient to hire only white applicants.¹³⁰

This possibility poses an intriguing test of Posner's theory on the nature of justice: if racial discrimination in such a case is wealth maximizing,¹³¹ is it just to exclude from consideration for employment a black applicant who is probably qualified for the job, and whose purely hypothetical "disability" (in a statistical or probabalistic sense) is not of his own making?¹³² It would seem that Posner must conclude that this result is just; if people can be presumed to have given *ex ante* consent to a system that maximizes the size of the pie, they can then be presumed in Posner's view to have consented to the system that gives them a relatively small slice. Thus, the interests of justice are served.

plus $111 \times \$0.10$ (the cost of inspecting 111 red bulbs to find 100 good ones), plus $222 \times \$0.01$ (the cost of sifting through 222 bulbs to find 111 red bulbs). This totals \$113.32. The cost of strategy 2 will be $100 \times \$1.00$ plus $118 \times \$0.10$ (the cost of inspecting 118 randomly-selected bulbs, of which 85%, or 100, will be good). This totals \$111.80, and is thus the preferred strategy. Under this strategy, it can be demonstrated that about 53 of the bulbs bought will be red, and about 47 will be yellow.

130. The several assumptions in this paragraph are of facts that may be true. No effort is made here to prove that they are true or even to assert that they are true. The assumptions seem plausible, and it is interesting to see what Posner's theory would suggest if these assumptions were in fact borne out.

131. At least one commentator has questioned the efficiency of this sort of discrimination, arguing that, while it may be profit-maximizing for each employer, it creates an external social cost in the form of the demoralization of the minority work force. See Schwab, *Is Statistical Discrimination Efficient?* (unpublished draft dated December, 1981). However, Posner clearly thinks that this form of discrimination is wealth-maximizing, which is all that matters for purposes of the present argument. See p. 362.

132. The horrors of this situation should not be exaggerated: as in the bulb case, there could be a price adjustment in a free market. The black worker could normally agree to work at a lower wage during an initial trial period, with an agreed increase at some subsequent point. In effect, such an approach would mean that the black worker was bearing some significant part of what would typically be the employer's information cost of culling good employees from bad ones. Of course, this accommodation may be (and under present law is) restricted.

Again, it is not empirically demonstrable, but it seems likely that that result does not comport with the notions of justice held by most people.

Inexplicably, Posner backs away from the conclusion that wealth-maximizing racial discrimination is just, or should be permitted. He notes at the end of chapter 12 that "[t]he fact that much racial discrimination may be efficient does not mean that it is *or should be lawful*" (p. 363 (emphasis added)). In chapter 13, he puts even more distance between his specific views on discrimination and what seem to be the dictates of his general view on the ethical soundness of wealth maximization:

Permitting discrimination to be justified on efficiency grounds . . . would not only thwart the purpose of the equal protection clause by allowing much, perhaps most, discrimination to continue, but it would give the judges the power to pick and choose among discriminatory measures on the basis of personal values, for the weighing of the relevant costs and benefits would inevitably be largely subjective. (P. 378).

Coming from Posner, such statements seem shocking indeed, for they call into question not only the ethical superiority of wealth maximization, but also the principle that judges can, to a crude but ultimately satisfactory degree, objectively identify and give effect to valid efficiency concerns.

The remaining pages in this final part of the book are devoted to an analysis of reverse discrimination. Posner notes that, just as discrimination against blacks may in some cases be efficient, so too may discrimination in favor of blacks be an efficient response to a legal system that infers discrimination from underrepresentation (p. 407). Again, however, Posner rejects the more efficient result. This is consistent with the views expressed in chapters 12 and 13 on discrimination, but seems inconsistent with his wealth-maximization ethic as revealed elsewhere in the book. Both as to discrimination and reverse discrimination, Posner has rendered what many would agree is a sound result: that they are impermissible when based on racial or ethnic categories. The puzzle is in reconciling these views with the wealth-maximization theory.

CONCLUSION

Posner's work has always been both controversial and stimulating. While he did not invent economic analysis of law,¹³³ he did apply its basic doctrines with spectacular comprehensiveness in the first edition of *Economic Analysis of Law*, in 1973. That book substantially set the agenda for a major part of legal scholarship in the years since; perhaps several dozen law review articles

133. Posner gives credit principally to Gary Becker, Ronald Coase, and Guido Calabresi for pioneering the law-and-economics field (pp. 2, 4). But if these three may be said to have put economic analysis of law on the map, Posner may be said to have built the super-highway connecting it with every major area of law.

have used a brief passage from *Economic Analysis of Law* as a point of departure, and gone on to criticize or elaborate upon Posner's models.¹³⁴ In that book, and also in many of his articles, Posner's role has been an intermediate one: he has not originated the basic concepts, nor has he followed his ideas through to the last detail, but he has been enormously prolific and productive at identifying connections, and making sense of the disparate strands of an emerging discipline. By that standard, *Economic Analysis of Law* was a highly successful and important work.

By that same admittedly lofty standard, *The Economics of Justice* is much less successful. Its glaring lack is precisely the quality that made *Economic Analysis of Law* so useful: a clear and consistent overview of how the pieces of economic analysis fit together in a coherent whole. One wishes that Posner had chosen a title for this work that was both humbler and more accurate, and saved the present title for a book that probably cannot be written yet. *The Economics of Justice* is interesting and readable, but ultimately unconvincing on its main points. It is unable to persuade the reader that wealth maximization is truly an ethical principle at all, much less the best possible ethical principle. It is not even clear that Posner himself believes in his theory in the extreme form in which he has stated it; in any case, the power of his vision is not sufficient this time to bring the reader over to his side.

134. The truth of this assertion can be seen by examining any recent volume of any journal with a substantial specialization in law and economics. For example, no fewer than eight of the articles in a recent volume of the *Journal of Legal Studies* (Volume 8, 1979) cite Posner's *Economic Analysis of Law*, usually among the first several footnotes. See 8 J. Legal Stud. 103, 231, 253, 295, 303, 403, 457, 527. However, see *supra* note 23 for a partial explanation of this.